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No. 03-407

IN THE

Supreme Court of the United States

JOHN F. KOWALSKI, Judge,
26th Judicial Circuit Court of Michigan, *et al.*,

Petitioners,

v.

JOHN C. TESMER, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

The National Legal Aid and Defender Association (NLADA), a nonprofit corporation, works to support indigent defender services and civil legal assistance to those who cannot afford lawyers. Through its Defender Legal Services division, NLADA provides training, information, and technical assistance to public defender offices and others who provide legal services to indigent criminal defendants. NLADA's American Council of Chief Defenders is a leadership council that is dedicated to promoting fair justice systems and ensuring that citizens who are accused of crimes have adequate legal representation. NLADA has approximately 680 program members, representing 12,000 lawyers, including nonprofit organizations, government agencies, legal aid organizations, and law firms; NLADA also has approximately 1,000 individual members.

NLADA traces its roots to the National Alliance of Legal Aid Societies, which was formed by 15 legal aid societies in 1911. It is the oldest and largest national nonprofit membership association that devotes its resources exclusively to serving the equal justice community.

NLADA is a leading voice in public policy debates on equal justice issues. In pursuit of its efforts, NLADA has filed *amicus curiae* briefs in major constitutional cases before this Court that involve the administration of the criminal justice system and the right to counsel.

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1. No counsel for a party authored this brief in whole or in part. No person or entity other than the National Legal Aid and Defender Organization and its counsel made a monetary contribution to the preparation or submission of this brief. Petitioners and respondents have consented to the filing of this brief and their letters of consent have been filed with the Clerk of this Court pursuant to Supreme Court Rule 37.3(a).

NLADA submits this *amicus curiae* brief because it believes that the Michigan statute's denial of appellate counsel to indigent defendants who enter guilty or no contest pleas violates equal protection guarantees and will leave indigent defendants unable to mount any meaningful challenge to excessive sentences or other errors in the plea proceedings. NLADA is particularly concerned that the position advanced by petitioners' *amici*, under which states would be free to condition pleas by indigent defendants – and indigent defendants only – on a waiver of the right to appellate counsel, even if that right is reaffirmed as a constitutional guarantee for indigent defendants who enter guilty or no contest pleas, would have serious constitutional and practical ramifications.

SUMMARY OF ARGUMENT

Both petitioners' *amici* and respondent Kolenda argue, as an apparent alternative basis for overturning the Sixth Circuit's decision, that Michigan is free to compel waivers of the right to appointed appellate counsel. Petitioners' *amici* frankly admit their interest in the question whether their states are free to adopt Michigan's practice of compelling a waiver of an indigent defendant's right to appellate counsel. That is, even if the Court upholds the Sixth Circuit's decision that the right to appointed counsel indeed obtains on appeals from plea-based convictions, *amici* would have the Court hold that a state may compel a waiver of that right as an essential precondition to acceptance of a guilty or no contest plea.

The statutory provision that requires a trial court to ascertain that an indigent defendant entering a plea understands that the defendant will not be provided with appointed appellate counsel is an essential part of the Michigan statute's overall fabric. The statute's unconstitutionality dooms the attempt by Kolenda and petitioners' *amici* to salvage the waiver provision as a freestanding enactment, under which Michigan can compel

waivers of appellate counsel. But even if that were not so, the broader question is whether a state (or an individual judge) can compel a waiver of the right to appointed appellate counsel as a precondition for acceptance of a plea. The equal protection violation that arises from the "waiver" theory advanced by petitioners' *amici* is identical to, if not more egregious than, that which arises from Michigan's attempt to legislate away the constitutional right of indigent defendants to appointed appellate counsel in the first instance.

Respondent Kolenda and petitioners' *amici* would have the Court rule that indigent defendants – and only indigent defendants – can be compelled to surrender their right to appellate counsel if they wish to enter a guilty or no contest plea. A moneyed defendant would, of course, be free to retain appellate counsel on appeal from a plea-based conviction. This invidious discrimination is utterly inconsistent with the principles that sustain the right to appointed appellate counsel.

Petitioners' *amici*, in trumpeting their theory, argue that defendants may reject the enforced waiver of appellate counsel by going to trial. But petitioners' *amici* well know that the vast majority of felony charges against indigent defendants are resolved by pleas, and that the choice they would impose is an illusory one at best. More to the point, petitioners' *amici* would foist this "choice" *only* upon indigent defendants.

STATEMENT OF THE FACTS

NLADA adopts the Statement of the Facts in respondent's brief.

ARGUMENT

Michigan Cannot Compel Indigent Defendants, And Only Indigent Defendants, To Waive Their Constitutional Right To Appointed Appellate Counsel As A Precondition For Entering A Plea Of Guilty Or No Contest.

A. The Unconstitutionality of Section 770.3a Pretermits Enforcement of Any Purported Waiver of the Constitutional Right to Counsel Under the Michigan Statute.

Article I, Section 20, of the Michigan Constitution (as amended in 1994), requires leave of court for an appeal of a criminal conviction following a guilty or no contest plea. Pursuant to a statute that the Michigan legislature enacted in 2000, indigent defendants "shall not have appellate counsel appointed for review of the defendant's conviction or sentence" in seeking leave to appeal. MICH. COMP. LAWS § 770.3a(1). Counsel may be appointed only if the prosecution takes an appeal, the sentence is beyond the outer limits of the guideline range, the defendant has entered a conditional appeal, or if leave is granted for an appeal. MICH. COMP LAWS § 770.3a(2). There is no dispute that the 2000 statute was intended to – and did – deny appointed counsel to most indigent defendants who plead guilty or no contest. Brief for the Petitioners at 29, 33-34, 36-37; Brief of the States of Iowa, *et al.* as *Amici Curiae* in Support of Petitioner (Amici's Brief) at 19-20.

Michigan Court Rule 6.302(B), in compliance with the statute, MICH. COMP. LAWS § 770.3a(4), requires that a trial court that accepts a guilty or no contest plea to "advise the defendant and . . . determine whether the defendant understands": (i) that "any appeal from the conviction and sentence" is by "application for leave to appeal and not by right"; and (ii) that the defendant

is not entitled to appointed counsel except in the circumstances set forth in Section 770.3a(2). Mich. Ct. R. 6.302(B)(5), (6). Based on this rule, respondent Kolenda and petitioners' *amici* argue (as noted in respondents' brief, for the first time before this Court, Brief for Respondents at 41) that – even if the right to counsel under *Douglas v. California*, 372 U.S. 353 (1963), extends to appeals from convictions entered on guilty or no contest pleas, as the Sixth Circuit held, *Tesmer v. Granholm*, 333 F.3d 683, 695-701 (6th Cir. 2003) (*en banc*), – Mich. Ct. R. 6.302 is a valid exercise of Michigan's purported power to compel indigent defendants to waive their right to appellate counsel as a prerequisite to acceptance of indigents' guilty or no contest pleas. Brief of Respondent Kolenda (Kolenda Brief) at 17-20; Amici's Brief at 15-21.

There is considerable irony in the promulgation of this theory. Rule 6.302(B) effectuates Section 770.3a(4), which statute requires that a trial court "shall advise the defendant that, . . . if the plea is accepted by the court, the defendant waives the right to have an attorney appointed at public expense to assist in filing an application for leave to appeal . . . and shall determine whether the defendant understands the waiver." § 770.3a(4), MICH. COMP. LAW. Kolenda and petitioners' *amici*, however, would have the Court hold that Section 770.3a(4) and Rule 6.302(B) should survive a declaration that Section 770.3a(1) is unconstitutional, such that Michigan – which promulgated the statute and rule to enforce its determination that there is no right to appellate counsel on appeal from plea-based convictions – can use subsection (4) to enforce a waiver of the constitutional right to appellate counsel once its statute is stricken as unconstitutional.

While a declaration that one section of a statute is unconstitutional "does not necessarily defeat or affect the validity of its remaining provisions," the unconstitutional provision can

be treated as severable only "if what is left is fully operative as law," such that the legislative body would have enacted the remaining provisions independently of the unconstitutional section. *Champlin Rfg. Co. v. Corporation Comm'n of Okla.*, 286 U.S. 210, 234 (1932) (citations omitted). "Severability is of course a matter of state law," requiring this Court to determine whether an unconstitutional provision can be stricken, while leaving the remainder of the statute enforceable under state law. *Leavitt v. Jane L.*, 518 U.S. 137, 139-40 (1996).

Michigan follows the usual rule that, "[i]f a portion of an act is invalid, a court should enforce the remainder to the extent that it can be given effect consistent with the legislative intent underlying the act." *County Road Ass'n of Mich. v. Governor*, 677 N.W.2d 340, 348 (Mich. Ct. App. 2004) (citation omitted).[2] "To be capable of separate enforcement, the valid portion of the statute must be independent of the invalid sections, forming a complete act within itself." *Pletz v. Secretary of State*, 336 N.W.2d 789, 809 (Mich. Ct. App. 1983) (footnote omitted). One test for making that determination "is whether the law-making body would have passed the statute had it been aware that portions therein would be declared to be invalid and, consequently, excised." *Id.* (footnote omitted). "When the valid object of the act can be achieved without the invalid part, the act will be upheld." *Michigan State AFL-CIO v. Michigan Employment Relations Comm'n*, 538 N.W.2d 433, 447 (Mich. Ct. App. 1995) (citation omitted), *aff'd*, 551 N.W.2d 165 (Mich. 1996).

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2 By statute, "[i]f any portion of an act . . . shall be found to be invalid by a court, such invalidity shall not affect the remaining portions . . . which can be given effect without the invalid portion . . . , and to this end acts are declared to be severable." MICH. COMP. LAWS, § 8.5.

Neither Kolenda nor petitioners' *amici* even attempt to argue that subsection (4) can reasonably be seen as severable from the remainder of Section 770.3a. No such construction is possible: subsection (4) merely enforces the purported lack of entitlement to appointed counsel that Michigan enacted in subsection (1). And Mich. Ct. R. 6.302 merely further effectuates the statutory directive. Subsection (4) was not adopted to work a waiver of the right to counsel, but to effectuate a legislative determination that *no right to counsel* exists for appellate review of plea-based convictions. Because that provision is not severable, the waiver theory advanced by Kolenda and petitioners' *amici* fails at the outset.

B. Demanding a Waiver of the Constitutional Right to Counsel by Indigent Defendants Who Wish to Plead Guilty or No Contest Violates the Equal Protection Clause of the Fourteenth Amendment.

As respondents correctly note, the newly-minted "waiver" argument itself gives rise to an equal protection violation. Reduced to its essence, that argument would mean that the states are required, as a matter of Fourteenth Amendment law, to provide appellate counsel to indigents who plead guilty or no contest, but that the states may deny that right as a condition of a guilty or no contest plea, thus effectively denying meaningful appellate review to indigents who do not elect to go to trial.[3] This facile attempt to avoid the implications of a ruling that *Douglas* extends to Michigan's appellate procedure for appeals from convictions entered on guilty or no contest pleas cannot succeed.

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3. See Brief of *Amici Curiae* National Association of Criminal Defense Lawyers and National Association of Federal Defenders in Support of Respondents at 8-18.

1. A waiver of the right to counsel on appeal is not an inherent incident of a guilty or no contest plea.

It is unacceptable for *amici* to argue, as they do, that the "waiver" they wish to have the Court create is in any respect analogous to the well-recognized waiver of trial rights that is necessarily worked by a guilty or no contest plea. Amici's Brief at 16. There is a dispositive distinction:

> [A] guilty plea represents a break in the chain of events *which has preceded it* in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred *prior to the entry of the guilty plea.*

Tollett v. Henderson, 411 U.S. 258, 267 (1973) (emphasis added). So it is that a guilty plea waives the right to a jury trial, the privilege against self-incrimination, and the right to confront one's accusers. *Brady v. United States*, 397 U.S. 742, 748 (1970); *Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969).[4]

That a guilty or no contest plea waives significant constitutional rights necessarily limits the scope of potential appellate issues following a conviction entered on a plea. But

4 The Michigan Supreme Court's decision in *People v. Bulger*, 614 N.W.2d 103 (Mich.), *cert. denied*, 531 U.S. 994 (2000), sets forth a list of "issues" that a defendant waives by entering a guilty or no contest plea, *e.g.*, "search and seizure claims," issues "relating to the defendant's factual guilt and the prosecution's ability to prove the case," and denial of speedy trial. *Id.* at 112 n.7. Of course, those "issues" are conceptually no different from the constitutional rights identified in *Brady* and *Boykin*, in that they stem from *pre-guilty plea* proceedings and events.

petitioners, while relying on the purported absence of a federal constitutional right to a criminal appeal, Brief for Petitioners (Kowalski Brief) at 27 (citing *McKane v. Durston*, 153 U.S. 684 (1894)), recognize, as they must, that Michigan has provided an appellate framework for appeals from convictions entered on guilty or no contest pleas. *Id.* at 35-37. That framework exists *only* for appeals from guilty or no contest pleas. *Id.* There is thus no basis for arguing that, in Michigan, a guilty or no contest plea inherently waives the right to an appeal for *any* defendant, moneyed or indigent.[5]

The "waiver" argument thus founders on the same constitutional principle that invalidates Section 770.3a, *i.e.*, it would "create a different opportunity for access to the appellate system based upon indigency." *Tesmer*, 333 F.3d at 701. It is *only* indigent defendants who, according to Kolenda and petitioners' *amici*, must waive the right to appellate counsel to enter a guilty or no contest plea in Michigan. But this Court in *Douglas* left no room for doubt that "discrimination against the indigent" on a matter so fundamental as the right to counsel is an "evil," because "there can be no equal justice where the kind of appeal a man enjoys 'depends on the amount of money he has.'" *Douglas*, 372 U.S. at 355 (citation omitted). The argument advanced by petitioners' *amici* would, carried to its logical extent, authorize a judge – in a jurisdiction that does not have Michigan's unique statutory scheme – simply to announce that

5. Petitioners' *amici* purport to find support in *Iowa v. Tovar*, __ U.S. __, 124 S. Ct. 1379 (2004). Amici's Brief at 16. But *Tovar* holds only that a defendant "may choose to forgo representation" in pleading guilty," *id.* at 1387, that the defendant in that case had done so, and that additional admonitions required by the Iowa Supreme Court were not constitutionally required. *Id.* at 1388-90. Nothing in *Tovar* supports the notion that an indigent defendant can be *compelled* to waive the right to appointed appellate counsel as a precondition to entering a guilty or no contest plea.

he or she will not accept a guilty plea from an indigent defendant unless that defendant waives the right to appellate counsel.

2. The Equal Protection Clause forbids forcing indigent defendants to waive their right to appellate counsel.

As this Court has recognized, criminal defendants face "difficult choices" in the "plea bargaining process" when compelled to weigh "the risk of more severe punishment" after a trial against "substantial benefits in return for the plea." *United States v. Mezzanatto*, 513 U.S. 196, 209-10 (1995) (citations omitted). But "the imposition of these difficult choices [is] an inevitable – and permissible – attribute of any legitimate system which tolerates and encourages the negotiation of pleas." *Id.* at 210 (citations and internal quotations omitted). The prosecution may offer to condition a plea on a defendant's waiver of rights that are not inherently waived by a guilty plea and, if the defendant's waiver is knowing and voluntary, the bargain will be upheld. *Id.* at 210-11 (upholding plea agreement that included defendant's waiver of protections against use of statements made in course of plea discussions); *see Town of Newton v. Rumery*, 480 U.S. 386, 394 (1987) (voluntary "release-dismissal agreement," in which defendant waived right to 42 U.S.C. § 1983 action in exchange for dismissal, is constitutionally valid); *Barry v. Peterson*, 887 F.2d 635, 639-40 (5th Cir. 1989) (upholding defendant's execution of covenant not to sue county for injuries suffered in jail as part of plea bargain). *See also Parrish v. Fulcomer*, 150 F.3d 326, 328 (3d Cir. 1998) (upholding defendant's waiver of jury trial in exchange for state's agreement not to seek death penalty); *Lake James Cmty. Volunteer Fire Dep't, Inc. v. Burke County, N.C.*, 149 F.3d 277, 280 (4th Cir. 1998) ("[t]he contractual waiver of a constitutional right must be a knowing waiver, must be voluntarily given, and must not undermine the relevant public interest") (citation omitted), *cert. denied*, 525 U.S. 1106 (1999).

The courts of appeal have addressed waivers of the right to appeal as a component of a plea bargain. *E.g.*, *United States v. Hahn*, 359 F.3d 1315, 1324-27 (10th Cir. 2004) (*en banc*); *United States v. Andis*, 333 F.3d 886, 889-92 (8th Cir.) (*en banc*), *cert. denied*, __ U.S. __, 124 S. Ct. 501 (2003); *United States v. Teeter*, 257 F.3d 14, 23-26 (1st Cir. 2001). Such waivers must, of course, be knowing and voluntary, and are subject to being set aside to allow appellate review when a miscarriage of justice would result from enforcement. *E.g.*, *Hahn*, 359 F.3d 1324-28. It goes without saying that such waivers are not imposed by federal law: indeed, an appeal from a plea-based conviction is allowed as a matter of right under 18 U.S.C. § 3742 for a challenge to the legality of the sentence. *Hahn*, 359 F.3d at 1320-22. And there is no limitation on the right to counsel that mirrors Michigan's coercive scheme.

In the context of negotiated waivers of the right to appeal, a miscarriage of justice will be found "where the district court relied on an impermissible factor, such as race." *Hahn*, 359 F.3d at 1327 (citation omitted); *accord*, *e.g.*, *Andis*, 333 F.3d at 891; *United States v. Elliott*, 264 F.3d 1171, 1173 (10th Cir. 2001). Michigan's requirement that indigent defendants waive their right to appellate counsel to enter a guilty or no contest plea is indisputably based on a wealth-based distinction, because only poor defendants are required to waive the right in order to enter a plea.

Thus, waivers of constitutional rights that would pass muster under *Mezzanatto*'s rationale, or under the rationale that permits voluntary waivers of the right to appeal, are fundamentally different from the "waiver" that petitioners' *amici* would have the Court approve here. It is one thing for the prosecution to negotiate a plea agreement that includes waivers other than those that are inherent in every guilty or no contest plea, and quite another for Michigan to *compel* a waiver of the

right to appellate counsel as a precondition to accepting such a plea by an indigent defendant – when no such waiver is demanded of a moneyed defendant.

This Court declined to enforce a waiver of a fundamental right – even when that waiver was freely negotiated between the prosecution and defense – in *Wheat v. United States*, 486 U.S. 153 (1988). The defendant had waived his Sixth Amendment right to be represented by conflict-free counsel, but the Court rejected the purported waiver because to allow the defendant to be represented by an attorney with a conflict of interest "constitutes a breach of professional ethics and invites disrespect for the integrity of the court." *Id.* at 162 (citation omitted). And, more recently, the Court recognized in *Mezzanatto* that, while the waiver of the protection against use of statements made during plea negotiations in that case was constitutionally acceptable, "[t]here may be some evidentiary protections that are so fundamental to the reliability of the factfinding process that they may never be waived without irreparably 'discredit[ing] the federal courts.'" 513 U.S. at 204 (citations omitted). The forced extraction of a waiver advocated by petitioners' *amici* would indeed bring discredit upon the criminal justice system by institutionalizing discrimination against criminal defendants, solely on the basis of their indigency.

3. Compelled waivers of the right to appellate counsel deny indigent defendants substantial equality in the criminal appellate process.

This Court has often addressed equal protection concerns in the context of criminal appellate review, beginning with *Griffin v. Illinois*, 351 U.S. 12 (1956), and more recently reaffirming that "an indigent must receive 'substantial equality' compared to the legal assistance that *a defendant with paid counsel would receive.*" *Smith v. Robbins*, 528 U.S. 259, 277

n.9 (2000) (citation omitted; emphasis added). That "substantial equality" requires, at a minimum, that an indigent defendant, "in *all* cases, have the right to have an attorney, zealous for the indigent's interests, evaluate his case and attempt to discern nonfrivolous arguments." *Id.* at 278 n.10 (citations omitted; emphasis added). The *Griffin* principle – which "reflect[s] both equal protection and due process concerns," *M.L.B. v. S.L.J.*, 519 U.S. 102, 120 (1996) (citation omitted) – safeguards the "right of *access to the courts.*" *Lewis v. Casey*, 518 U.S. 343, 350 (1996) (original emphasis). Michigan demands that indigent defendants must surrender perhaps the most essential component of the right of access to appellate review, *i.e.*, the assistance of a zealous appellate advocate in order to enter a guilty or no contest plea.

An insidious deprivation of equal protection lies beneath the suggestion of petitioners' *amici* that "Michigan has presented defendants with a choice – they may plead not guilty, in which case they will be afforded all of their procedural rights (including their right to counsel on appeal) or they may forego all of these rights by pleading guilty." Amici's Brief at 14. What is missing from this bland recitation is this: only indigents have to make the "choice" that Michigan demands.

The analytical flaw in the *amici*'s simplistic formulation is perhaps best demonstrated by this Court's decisions in *James v. Strange*, 407 U.S. 128 (1972), and *Fuller v. Oregon*, 417 U.S. 40 (1974). In *James*, the Court invalidated a recoupment statute that allowed Kansas to recover the costs of appointed counsel by imposing a lien on the indigent defendant, and which deprived the defendant of "any of the exemptions . . . for other judgment debtors except the homestead exemption." *Id.* at 130-31. That provision "strip[ped] from indigent defendants the array of protective exemptions Kansas has erected for other civil judgment debtors, including restrictions on the amount of

disposable earnings subject to garnishment." *Id.* at 135. Moneyed defendants who hired their own lawyers, however, faced no such disadvantage:

> The indigent's predicament under this statute comes into sharper focus when compared with that of one who has hired counsel in his defense. Should the latter prove unable to pay and a judgment be obtained against him, his obligation would become enforceable under . . . the Kansas Code of Civil Procedure. But, unlike the indigent under the recoupment statute, the code's exemptions would protect this judgment debtor.

Id. at 136-37.

The Court held that "to impose these harsh conditions on a class of debtors who were provided counsel as required by the Constitution is to practice . . . a discrimination which the Equal Protection Clause proscribes." 407 U.S. at 140-41. And the Court spoke in no uncertain terms in condemning the statute:

> We . . . recognize that state recoupment statutes may betoken legitimate state interest. But these interests are not thwarted by requiring more even treatment of indigent criminal defendants with other classes of debtors. . . . The statute before us embodies elements of punitiveness and discrimination which violate the rights of citizens to equal treatment under the law.

Id. at 141-42.

In contrast, in *Fuller*, payment under the Oregon recoupment statute required that the defendant be able to pay, taking into account the defendant's resources, and also allowed for remission. 417 U.S. at 45. As the Court observed, the statute

was "quite clearly directed only at those convicted defendants who are indigent at the time of the criminal proceedings against them but who subsequently gain the ability to pay the expenses of legal representation." *Id.* at 46. The Court distinguished *James v. Strange*, primarily because "[t]he convicted person from whom recoupment is sought thus retains all the exemptions accorded other judgment debtors," as well as the right to seek to remit the debt upon a showing of hardship. *Id.* at 47-48. Thus, although only indigent defendants were within the scope of the recoupment statute, their debt was treated no differently than the debt of a moneyed defendant to retained counsel. *Id.* at 48 (statute "is wholly free of the kind of discrimination that was held in *James v. Strange* to violate the Equal Protection Clause").

James and *Fuller* elucidate the egregious equal protection flaw that is inherent in the waiver theory. The requirement that indigent defendants – and *only* indigent defendants – must waive their right to appellate counsel if they wish to enter a guilty or no contest plea, while moneyed defendants are free to pursue their right to seek leave to appeal *with the assistance of counsel*, like the Kansas recoupment statute that was struck down in *James*, "embodies elements of punitiveness and discrimination which violate the rights of citizens to equal treatment under the law." 407 U.S. at 141-42.

As respondents note, the logical import of the waiver argument of petitioners' *amici* is that Michigan, if it can force indigent defendants to surrender their right to appellate counsel in exchange for allowing indigents to plead guilty, could similarly require that indigent defendants surrender a plethora of other rights, for example, their rights to a transcript at state expense and to file an appeal without a filing fee. Brief of Respondents at 42-43. There is no impediment to those results in the analysis that petitioners' *amici* advance to support their waiver theory.

Petitioners' *amici* argue that Michigan has "a strong interest in obtaining guilty pleas and in ensuring finality of the resulting convictions," such that Michigan "may attempt to finalize" such convictions by compelling a waiver of appellate counsel. Amici's Brief at 18-19. The same could easily be said in support of requiring indigents to pay filing fees for an appeal or to deny indigent defendants access to a transcript, the unfairness of which this Court, in unbroken lineage, has long decried. *E.g.*, *Draper v. Washington*, 372 U.S. 487, 496 ("the State must provide the indigent defendant with means of presenting his contentions to the appellate court which are as good as those available to a nonindigent defendant with similar contentions"), *cert. denied*, 374 U.S. 852 (1963); *Burns v. Ohio*, 360 U.S. 252, 257-58 (1959) (imposition of filing fees on indigent defendant violates equal protection); *Eskridge v. Washington State Bd. of Prison Terms & Paroles*, 357 U.S. 214, 215-16 (1958) (indigent defendant entitled to free transcript); *Griffin*, 351 U.S. at 19 ("[d]estitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts"). Indeed, *Griffin*'s equal protection values relate precisely "to the legitimacy of fencing out would-be appellants based solely on their inability to pay core costs." *M.L.B.*, 519 U.S. at 120 (citation omitted).

What is at stake is thus nothing less than the entire panoply of protections that the Court has erected to protect the rights of indigent criminal appellants.[6] Petitioners' *amici* well know that

6 That this is so – and that the Court's decision will have an impact far beyond Michigan – is shown by the statement in the brief of petitioners' *amici* that, while none of the states who have submitted the brief "have adopted rules like the specific Michigan rule at issue here, these States have an interest in the broader constitutional question of what measures they may take in furtherance of their strong interest in the finality of guilty pleas, and the related question of when those measures may be subject to a facial challenge." Amici's Brief at 1-2.

the vast majority of criminal prosecutions of indigent defendants are resolved by plea-based convictions. *See* Brief of *Amici Curiae* National Association of Criminal Defense Lawyers and National Association of Federal Defenders in Support of Respondents at 6-7. If the states can insulate plea-based convictions from appellate review by compelled "waivers" of rights that this Court has proclaimed as necessary to ensure fairness for indigents in the appellate process, the states may well achieve the "finality" for which petitioners' *amici* advocate, but at the cost of insulating errors – including excessive sentences – from appellate review by indigent defendants. *See* Mara Matuszak, *Limiting Michigan's Guilty and Nolo Contendere Plea Appeals*, 73 U. DET. MERCY L. REV. 431, 440-43 (1996) (noting varying estimates of percentage of defendants who obtained relief on appeals from plea-based convictions before adoption of amendment to Section 20). That scenario invokes the due process imperative that informs the *Griffin-Douglas* rationale, *i.e.*, "the essential fairness of the state-ordered proceedings anterior to adverse state action." *M.L.B.*, 519 U.S. at 120 (citation omitted).

Indeed, this Court has said that, "[b]ecause the fundamental importance of the assistance of counsel does not cease as the prosecutorial process moves from the trial to the appellate stage . . . the presumption of prejudice must extend . . . to the denial of counsel on appeal." *Penson v. Ohio*, 488 U.S. 75, 88 (1988). Yet, the waiver theory propounded by petitioners' *amici* would institutionalize the denial of appellate counsel to indigent defendants as a condition precedent to acceptance of a guilty or no contest plea. The scheme *amici* propose would demand that indigent defendants, unlike their moneyed counterparts, must accept a presumptively prejudiced appellate framework or take their chances at trial. *See* Amici's Brief at 14. Enforcing that harsh choice hardly does credit to the courts that must strip impoverished defendants of their right to counsel, or to the overarching statutory scheme that compels the courts to do so.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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